



## COURT MARTIAL

**Citation:** *R. v. Duvall*, 2018 CM 2027

**Date:** 20180928

**Docket:** 201764

Standing Court Martial

Canadian Forces Base Esquimalt  
Victoria, British Columbia, Canada

**Between:**

**Her Majesty the Queen**

- and -

**Captain S.P. Duvall, Accused**

**Before:** Commander S.M. Sukstorf, M.J.

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**Restriction on Publication: By court order made under section 179 of the *National Defence Act* and section 486.5 of the *Criminal Code*, information that could disclose the identity of the person described during these proceedings as the complainant shall not be published in any document or broadcast or transmitted in any way.**

### **REASONS FOR SENTENCE**

(Orally)

[1] Captain Duvall, today you admitted your guilt to one charge contrary to section 93 of the *National Defence Act* (*NDA*) for disgraceful conduct. The particulars read as follows:

“In that he, between 1 September 2009 and 30 September 2009, at or near Canadian Forces Base Esquimalt, British Columbia, touched M.B. on the vaginal area without her consent.”

[2] The Statement of Circumstances filed in court is reproduced to provide a full account of the circumstances of both the offence and the offender.

## “STATEMENT OF CIRCUMSTANCES

1. At all material times, Captain Duvall was a member of the Regular Force, Canadian Armed Forces (CAF). At the time of the incident, Captain Duvall was posted to Venture (now Naval Fleet School (Pacific)), at Canadian Forces Base (CFB) Esquimalt and had the rank of Acting Sub-Lieutenant. Captain Duvall was later posted to the 4th Artillery Regiment (General Support (GS)), formerly known as 4th Air Defence Regiment, on 27 May 2011, where he remained until his release. Captain Duvall was released from the CAF on 18 January 2017.

2. In September 2009, M.B. was recently out of Basic training and posted to CFB Esquimalt. She was completing the naval environmental training program for officers (NETPO). She had met Capt Duvall a few days prior the incident.

3. One night in September 2009, M.B. and few colleagues, including Capt Duvall were drinking alcohol at the Wardroom on the Base and later went out in downtown Victoria, BC and had a few more drinks. When they returned to the Base after bar closing time, they all went to Capt Duvall's room to continue drinking as he had more beer in his room. They hung out in the part of the room where the bed of Capt Duvall was to stay away from his roommate as much as possible.

4. At the end of the evening, as she had consumed 8 to 10 beers throughout the night, M.B. laid down on Capt Duvall's bed while everyone else remained in the room, talking and hanging out and eventually, she laid on her stomach. After the rest of the group left the room, Capt Duvall started massaging M.B.'s back. As he was positioned over top of her, Capt Duvall then started touching her vaginal area over her jeans, from behind. M.B. never consented to have Capt Duvall touch her genital area. The incident made her uncomfortable and she froze. She then told him to stop, got up and returned to her room immediately.”

### **Joint submission**

[3] In a joint submission, the prosecution and defence counsel recommend that I impose a sentence of a severe reprimand and a fine in the amount of \$2000.

[4] In *R. v. Anthony-Cook*, 2016 SCC 43, the Supreme Court of Canada clarified that a trial judge must impose the sentence proposed in a joint submission, “unless the proposed sentence would bring the administration of justice into disrepute, or is not otherwise in the public interest.”

[5] As you heard when I verified the guilty plea earlier, by entering into a plea bargain, the constitutional right to be presumed innocent is given up and this should never be done lightly. In fact, by virtue of the oath taken by all service members, this

right is one we all stand to protect. Thus, in exchange for making a plea, the accused must be assured of a high level of certainty that the Court will accept the joint submission.

[6] The prosecutor, who jointly proposed the sentence, advised that the prosecution has been in contact with the chain of command and the victim. He is aware of the needs of the military and its surrounding community and is responsible for representing those interests. Defence counsel, Lieutenant-Commander Walden, acts exclusively in the accused's best interest, including ensuring that the accused's plea is a voluntary and informed choice and unequivocally acknowledges his guilt.

[7] As members of the legal profession and accountable to their respective law societies, the Court relies heavily on the professionalism, honesty and judgement of both the counsel and their duty to the Court.

### **Assessing the joint submission**

[8] In this case, the prosecutor read the Statement of Circumstances and provided the documents required at the *Queen's Regulations and Orders for the Canadian Forces* article 112.51 supplied by the chain of command. The Statement of Circumstances was introduced on consent to inform the Court of the context of the incident that led to the charges before the Court as well as facts pertaining to Captain Duvall.

[9] Further, the Court benefitted from counsel's submissions to support their joint position on sentence where they highlighted the facts and considerations relevant to Captain Duvall. The prosecution and defence provided the Court with judicial precedents for comparison.

### **The offender**

[10] Captain Duvall is 38 years old. He enrolled in August 2006 and appears to have served his country well. He is supporting a spouse and two children. In January 2017, he was released under a section 5(f) item of release, considered unsuitable for further service.

[11] He does have a conduct sheet, however, I accept that the conduct before the Court predates any entry in the conduct sheet.

[12] As noted in the Statement of Circumstances, Captain Duvall was a colleague of the victim, M.B., and the alleged incident occurred over nine years ago, after a group had been out for the evening. The inappropriate touching occurred, over her clothes, after the remaining members of the group had retired for the evening. Although M.B. froze, she did tell him to stop; she got up and returned to her room immediately and that was the end of the incident.

### **Purpose, objectives and principles of sentencing to be emphasized in this case**

[13] The fundamental purpose of sentencing in a court martial is to promote the operational effectiveness of the Canadian Armed Forces (CAF) by contributing to the maintenance of discipline, efficiency, morale, and to contribute to respect for the law and the maintenance of a just, peaceful and safe society.

[14] This fundamental purpose is achieved by imposing sanctions that have one or more of the objectives set out within the *NDA* at subsection 203.1(2). The prosecution has emphasized that, in negotiations, both he and defence counsel closely considered the objectives of sentencing set out therein.

[15] On the facts of this case, both the prosecution and defence submit that the objectives they considered most important are general and specific deterrence as well as denunciation. I agree with their assessment.

**Accounting for relevant aggravating or mitigating circumstances**

[16] Under paragraph 203.3(a) of the *NDA*, in imposing a sentence the Court shall take into consideration that the sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender.

**Aggravating factors**

[17] After hearing the submissions of counsel, the Court highlights the following aggravating factors for the record:

- (a) This incident occurred over nine years ago and I accept counsel's submissions that Captain Duvall must be treated as a first-time offender for this incident; and
- (b) At the time of the incident, the accused and M.B were colleagues and had engaged in an evening out drinking. The incident itself reflects that Captain Duvall exercised poor judgement and invaded the personal space of M.B without seeking her consent. He disregarded this intimate boundary and didn't accord her the respect that she deserved.

**Mitigating factors**

[18] After hearing the submissions of counsel, the Court highlights the following mitigating factors for the record:

- (a) Captain Duvall's plea of guilty for the offences as described in the Statement of Circumstances must be given full weight. He has displayed courage in accepting responsibility. His guilty plea has helped the victim in that she does not have to testify or be cross-examined and it also

avoids a lengthy trial. In addition, as the prosecution highlighted, his guilty plea saved the Court and counsel time and resources; and

- (b) Captain Duvall has already been released 5(f) from the CAF and moved on with his life in a career outside of the CAF. The Court recognizes that he has already paid a very steep price for his conduct.

### **Parity**

[19] Pursuant to paragraph 203.3(b) of the *NDA*, the law requires that the sentence imposed be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances.

[20] In making the joint recommendation on sentence, the prosecution and defence relied upon a number of precedents; in short, based on the case law and the submissions made by counsel, it is clear that the sentence recommended in the joint submission is within an acceptable range based on the type of punishment historically awarded for this type of offence.

### **Assessing the joint submission**

[21] After considering counsel's submissions in their entirety and all the evidence before the Court, I must then ask myself whether the proposed sentence would be viewed by the reasonable and informed CAF member, as well as the public at large, as a breakdown in the proper functioning of the military justice system. In other words, would the acceptance of the proposed sentence cause the general public, the CAF community and its members to lose confidence in the military justice system?

[22] As this Court stated in earlier decisions, stopping inappropriate conduct in its infancy is not an easy task. As damaging as each act may be, even the slightest indiscretions have far-reaching effects and are unacceptable between colleagues working closely together. The failure to address even nominal indiscretions is exactly what threatens and undermines the military ethos, values, norms and ethics expected of every CAF member. The joint submission before the Court recognizes that even lower level misconduct must be addressed and resolved at the appropriate level.

[23] It takes significant courage for a victim or complainant to come forward to his or her chain of command to report conduct that has made him or her feel uncomfortable. It is imperative that everyone is encouraged to report misbehaviour and if we can stop this type of conduct early, in its infancy, then we can all more confidently work together as a unit and team.

[24] As a result of careful negotiations between the prosecution and defence counsel, Captain Duvall pleaded guilty to the section 93 offence of disgraceful conduct and has accepted responsibility for his actions. Section 93 of the *NDA* criminalizes conduct that is "shockingly unacceptable" and is punishable up to imprisonment for a term not

exceeding five years or to less punishment. The maximum sentence is significant and is a reflection of the seriousness of the offence.

[25] Counsel have recommended a severe reprimand which is intended to send a message to the larger community that any inappropriate conduct, involving indiscreet touching, is unacceptable and will be severely punished. Most importantly, the Court notes that Captain Duvall has fully accepted responsibility for his conduct acknowledging publicly that his actions crossed the line.

[26] Considering all of the factors, the circumstances of the offence and of the offender, any indirect consequences of the finding and the sentence, the gravity of the offence and the previous character of the offender, I am satisfied that counsel have discharged their obligations in making their joint submission. The recommended sentence is in the public interest and does not bring the administration of justice into disrepute.

**FOR THE REASONS, THE COURT:**

[27] **FINDS** you guilty of the one charge before the Court, contrary to section 93 of the *NDA* for disgraceful conduct.

[28] **SENTENCES** you to a severe reprimand and a fine in the amount of \$2,000.

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**Counsel:**

The Director of Military Prosecutions as represented by Major A. van der Linde

Lieutenant-Commander B. Walden, Defence Counsel Services, Counsel for Captain S.P. Duvall.